Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

CHARLES J. SELLENS,

Petitioner,

v.

AMERICAN STATES INSURANCE COMPANY; THE AGENCY; DOUG GEUBELLE; RICHARD MARQUEZ; JAMES BAMBICK, CARLOS CAULDRON, JR.; CLAIRE McCLELLAN; PATRICIA SMITH; JACK ECREMENT; and CARL EISELE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether it was error for the Kansas Supreme Court to hold that the petitioner's petition was untimely and/or that he had no cause of action against respondents in conflict with obvious contrary language in Kansas statutes, its own previous decisions, and further in conflict with decisions of this court, other federal courts of appeals, and other state supreme courts?

2. Whether this Court, in the exercise of its supervisory authority over the state courts, should establish some limit on the extent to which appeals may be disposed of in Kansas courts by means of unpublished opinions that are in conflict with decisions of this court, other federal courts of appeals, other state supreme courts and its own previous decisions?

3. Whether it was error for the Kansas Judicial System to fail to provide the petitioner with a trial by jury despite US and Kansas Constitutions holding that the right to trial by jury is guaranteed?

PARTIES TO THE PROCEEDING

The parties to this case are:

Plaintiff/Petitioner:

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*During the course of this litigation, American States Insurance, Company was acquired by: Safety Corporation, Safeco Plaza, Seattle, WA 97185.

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PETITION FOR A WRIT OF CERTIORARI

Charles J. Sellens, hereto also ("the petitioner") of Komagane, Japan respectfully petitions this Court for a writ of certiorari to review the judgment of the Kansas Supreme Court in this case.

OPINIONS BELOW

The Kansas Court of Appeals' memorandum opinion, the Kansas Supreme Court's denial of the petitioner's motion to publish, and the Kansas Supreme Court's denial of the petitioner's petition for review were not published. The Kansas Supreme Court's denial of the petitioner's petition for review is reproduced in the appendix, hereto ("App."), at 1a. The Kansas Appellate Courts' memorandum opinion is reproduced at App. 2a - 16a. The Kansas Supreme Court's denial of the petitioner's motion for publication is reproduced at App. 17a.

JURISDICTION

On September 24, 2004, the Kansas Court of Appeals issued an unpublished opinion in this instant case, adverse to the petitioner, affirming the trial court's rulings. The petitioner filed a timely motion for publication and he also filed a timely petition for review of the Kansas Court of Appeals' opinion as a matter of right. The Kansas Supreme Court denied the motion for publication on October 26, 2004. The Kansas Supreme Court denied the petition for review on March 1, 2005 without addressing the claim of review as a matter of right. The jurisdiction of this Court is invoked under 28 U.S.C. §1257-(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The rulings raise questions under the equal protection of the laws clause of the fourteenth amendment to the U.S. Constitution which provides that no state can: ". . . deny to any person within its jurisdiction the equal protection of the laws." The Constitution of the State of Kansas, Bill of Rights, Sections 1 and 2, speaks to the possession of equal and inalienable natural rights and to equal proection and benefit.

The Court of Appeals' rulings also raise questions under Section 5, of the Constitution of the State of Kansas (as amended to 1975) which states: "The right of trial by jury shall be inviolate." The Court of Appeals' rulings further raise questions under Article VII, of the Constitution of the United States which states: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ."

INTRODUCTION

This petition raises the issue of whether Kansas courts must adhere to the mandates of the U.S. and Kansas constitutions whose provisions guarantee the petitioner with a right to trial by jury. This petition also raises the issue of whether Kansas state courts must adhere to the tests and standards established by this Court under the equal protection of the laws clause of the fourteenth amendment to the U.S. Constitution.

This petition further raises issues of state judicial authorities ignoring governing statutes and precedent setting cases in issuing dispositive opinions then refusing to

publish the opinions despite mandates imposed by their own rules.

If the decisions and their analysis stand, there will continue to be a class of U.S. citizens in Kansas who will never be able to avail themselves of their right to equal protection of the laws and their right to trial by jury guaranteed them by the U.S. and Kansas Constitutions. Kansas courts will continue operating in a judicial feudalism in which citizens without rights owe homage to the system.

STATEMENT OF THE CASE

Sellens is a United States' citizen but has resided and worked in Japan since 1992. In 1993, he learned of a Japanese initiative to import panelized housing and determined to develop a business. (R.O.A., Vol. 2, p. 211, para. 3). Sellens and family members formed International Education Services, Inc. (IES) to deal with the complexities of doing business internationally. (Vol. 7, p. 140, para. 2). By 1996, the housing import/export venture had progressed to the point it was desirable for Sellens to build a model U.S. home for potential Japanese buyers to tour. (R.O.A., Vol. 2, p. 212, para. 2)

Sellens contracted with IES to build the house and, to meet the city of Lakin, Kansas' requirements, IES made an application for general liability coverage with Doug Geubelle (Geubelle) at The Agency in Lakin on August 21, 1996. (R.O.A., Vol. 7, p. 92, para. 4) Geubelle placed the insurance with American States Insurance Co., Inc. (ASI) and gave IES a certificate of insurance to use for proving liability insurance coverage. (R.O.A., Vol. 4, p. 95) Sellens' lender required him to have personal builder's risk insurance and Geubelle placed the

insurance with EMC Insurance. (R.O.A., Vol. 2, p. 112 [p. 27 ln. 4 - p. 28 ln. 25]).

The city of Lakin issued IES a building permit and a general contractor's license based on the insurance coverage provided by ASI. (R.O.A., Vol. 7, p. 93, para. 5) At a later date, James P. Bambick (Bambick) and ASI altered the IES policy, number 01-CE-093721-1, to identify Sellens and his brother, John, as the insureds. (R.O.A., Vol. 4, p. 24, para. 2) An unknown person altered the original IES insurance application, still in possession of The Agency, by drawing a line through applicant "International Education Services, Inc." and writing "Charles J. Sellens". (R.O.A., Vol. 2, p. 104)

On November 10, 1996, Brian E. Groth (Groth) suffered an injury while working on the project. (R.O.A., Vol. 3, p. 60, no. 12 & 13) On November 25, 1997, Groth commenced a lawsuit in the District Court of Kearny County, Kansas against Sellens et. al. (R.O.A., Vol. 2, p. 187-188)

ASI and its agents employed Attorney Richard Marquez (Marguez) to enter the case as the attorney for Sellens, but excluded IES. (R.O.A., Vol. 7, p. 79, para. 2) On December 24, 1997, Sellens learned of the existence of Marquez and phoned him. (R.O.A., Vol. 3, p. 63, 64, no. 23) Sellens informed Marquez that he had not been served but Marguez asserted that service was not an issue because he had already filed an entry of appearance. Marquez further asserted that Sellens couldn't refuse representation because the policy granted Marquez authority. (R.O.A., Vol. 2, p. 120 [p. 93, ln. 1-7])

ASI et. al. intended to have Marquez file a motion to dismiss the Groth suit based on a theory of Groth's

remedy being within the jurisdiction of workers compensation. (R.O.A., Vol. 7, p. 79, para. 4) This pleading would have identified Sellens as the employer of Groth and subjected Sellens to civil and criminal penalties for not having workers compensation insurance. (R.O.A., Vol. 3, p. 34-35)

This statement of the case has been accurately reproduced from the petitioner's petition (R.O.A., Vol. 1, pgs. 3-7). Kansas' precedent cases grant the petitioner's description of events, the status of those which occurred. See *Robertson* (p. 700, 472 P.2d p. 219) (Cited in *Weil & Assoc. v. Urban Renewal Agency of Wichita*, Kan. 479 P.2d 876)

REASONS FOR GRANTING THE WRIT

I.

BECAUSE THE KANSAS COURTS' VIOLATIONS OF THE CRUIKSHANK GUARANTIES PROHIBITING EXERTION OF ARBITRARY AND TYRANNICAL POWER WILL NEVER BE MORE EASILY RECOGNIZED THAN IN THIS CASE.

On March 22, 1778, Anne Robert Jacques Turgot, Baron De L'Aulne wrote Dr. Richard Price sharing his opinion on the founding of the United States including: "They (the Americans) are the hope of this world. They may become its model." The United States has done far more than become the world model envisioned by Turgot. It has become the world power that has been obligated to engage in numerous wars to ensure that the rule of law governs in other countries lest the rule of law be compromised in its own. The U.S. is currently making profound efforts to ensure that democracy and the rule of law become the systems of choice in Afghanistan and Iraq. Many U.S. governmental agencies have stated poli-

cies aimed at promoting democracy and the rule of law in former Soviet bloc countries. *Wright v. Wright,* 904 Pacific Reporter, Second Series 403 (1995) defines "rule of law" as:

> ". . . an authoritative legal doctrine, principle, or precept applied to the facts of an appropriate case adopting the rule of law that is most persuasive in light of precedent, reason and policy."

This petition focuses on the Kansas Judicial System's refusal to provide the petitioner with treatment and rulings based on the same rule of law that the U.S. has made its foreign policy foundation. The petitioner begins by identifying the Kansas Judicial System's refusal to provide him with a cause of action under K.S.A. 40-2.118(a) which reads:

> "For purposes of this act a 'fraudulent insurance act' means an act committed by any person who, knowingly and with intent to defraud, presents, causes to be presented or prepares with knowledge or belief that it will be presented to or by an insurer, purported insurer, broker or any agent thereof, any written statement as part of, or in support of, an application for the issuance of, or the rating of an insurance policy for personal or commercial insurance. . . ."

The petitioner has consistently maintained that the statutory language in K.S.A. 40-2, 118 instructs that an insured may maintain an action against an insurer and/or its agents for fraudulent acts.[1]

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[1]The issues were before this Court in Sellens v. American States Insurance Co., Inc., Docket No. 04-227. In the companion case, the Kansas Appellate Courts issued its first, and only, opinion on the newly passed K.S.A. 40-2, 118, Fraudulent Insurance Act

[footnote continued]

The appellate court disposed of the issue in this instant case by scribing that it didn't: ". . . feel compelled to reach the merits of the plaintiff's argument that the district court erred by (1) failing to find the defendants in violation of K.S.A. 40-2, 118; . . ." The trial court and the appellate court's silence on the issue has obliged the petitioner to argue that he has causes of action in addition to those granted by the Fraudulent Insurance Act. He sought recognition of his contractual, fiduciary status with all respondents.

First, the petitioner has consistently and reasonably argued that the fraudulent acts by ASI and its agents must be judged by standards imposed by contractual, fiduciary relationships. For *prima facie* evidence of a written contract, this Court need only look at the insurance policy that identifies the petitioner as a named insured. (R.O.A., Vol. 3, p. 119-116)

The Appellate Courts' opinion, without precedent citation, is that under the petitioner's theory, ". . . the contract was between American States and IES and any cause of action for changing the named insured would lie with the corporation." However, the pleadings identify the petitioner's claims for damages caused by fraudulent acts committed many months after he was fraudulently identified as a named insured and that his causes of action was provided for in the Fraudulent Insurance Act. Confusingly, the ruling seems to imply that IES would have been permitted to maintain a cause of action for

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and found it limited ". . . . to criminalize fraudulent acts committed against insurers and their agents." The opinion was unpublished assigning the petitioner with the burden of accepting the ruling, applying only to him, without regard to the rule of law. This Court denied the petitioner's Petition for Writ of Certiorari on November 1, 2004.

damages suffered by the petitioner. These are issues of first impression therefore unsuitable for summary judgment as a matter of law. See *Bergstrom v. Noah,* 266 Kan. 847, 872, 974 P.2d 531 (1999)

The petitioner's theory, that ASI had no rights under the policy but that ASI had: ". . . . the most profound obligations an insurance company ever imposed upon itself." (R.O.A., Vol. 6, p. 126, para. 3) finds support in *Bailey v. Talbert* which states: "Where one has agreed and definitely bound himself to perform contract, he cannot be heard to say that he cannot do so." 294 P.2d 220, 179 Kan. 169 (1956) See also *Meyer v. Diesel Equipment Co., Inc.,* 570 P.2d 1374, 1 Kan. App. 2d 574 (1977)

Secondly, the petitioner has consistently argued that Marquez's fraudulent acts must be judged under standards imposed by a contractual, fiduciary relationship. For *prima facie* evidence, this Court need only look at Marquez's entry of appearance as attorney for the petitioner in the Groth suit. (R.O.A., Vol. 3, p. 183)

The Kansas Court of Appeals' identified the petitioner's claim against Marquez as: ". . . .(2) a conflict of interest of the attorney hired by the insurance company to defend Sellens." The appellate court limited the issue by finding that: . . . . "notwithstanding any contractual relations, Sellens' cause of action sounded in tort rather than in contract." This too is an issue of first impression therefore unsuitable for summary judgment as a matter of law. *Bergstrom* (op. cit.)

The appellate court disposed of the issue with a ruling of untimeliness when it opined: "The record establishes that Sellens perceived, no later than December 1997, that he had been injured by defendants' actions and, thus, the

clock began running; his February 2000 claim was untimely." Since there is no precedent, reason limits the time from which to start the clock for Marquez to no earlier than December 12, 1997, Marquez's date of entry of appearance. (R.O.A., Vol. 3, p. 183) Marquez's withdrawal date was July 27, 1998. (R.O.A., Vol. 3, p. 66, no. 27) Marquez's fraudulent acts were committed in March through July of 1998. (R.O.A., Vol. 4, p. 78, 133 & 150) (R.O.A., Vol. 6, p. 117-200) (R.O.A., Vol. 7, p. 99)

The appellate court's opinion starts the clock for discovering Marquez's fraud three (3) to seven (7) months before the fraud was committed. There was no precedent cited for the ruling that effectively reduced the statutes of limitations sounding in tort from two (2) years to seventeen (17) months. Of importance, the record actually establishes that it was IES and not the petitioner that perceived no later than December that it had been injured by defendants' actions.

Another issue relating to the finding of untimeliness pertaining to Marquez is that he created a client file during the time he was the petitioner's attorney of record in the Groth suit. The petitioner demanded the file after Marquez's withdrawal as attorney of record. Marquez refused to surrender the file claiming that it was his personal property. *Re Dill*, 253 Kan. 195, 8535 P.2d 696 (1993) and *re Jackson*, 255 Kan. 542, 874 P.2d 643 (1994) identifies sanctions imposed upon attorneys who refused to provide their clients with their files upon demand. (R.O.A., Vol. 6, p. 9-10)

The petitioner filed his petition in February 2000 and was only permitted by the trial court to view the file via a discovery request. The petitioner's petition was not untimely but even if it had been, Marquez's fraudulent concealment of the file's contents tolled the running

of the statutes of limitations until July 3, 2000 when the petitioner was permited to view the file. (R.O.A., Vol. 4, p. 4, para. 3)

And thirdly, the petitioner has consistently asserted that the fraud committed by The Agency and Geubelle must be judged by standards imposed by contractual, fiduciary relationships. The appellate court found:

> "As was the case with American States, any breach of contract claim seems to be with the corporation rather than Sellens. IES employed Geubelle and The Agency to procure the insurance policy. A cause of action for breach of contract in procuring the policy should rest with IES."

The opinion ignores that the petitioner's theory was the respondents' initial acts of altering an insurance policy, their subsequent acts attempting to validate the policy, and/or their attempts to conceal their fraudulent acts were violations of K.S.A. 40-2, 118, the Fraudulent Insurance Act.

Importantly, the record reveals that the petitioner had a long term contractual relationship with The Agency and had personal vehicles insured through The Agency when ASI insured IES on August 21, 1996. (R.O.A., Vol. 2, p. 212, para. 5) The contractual relationship is underscored by the petitioner's letter to Geubelle dated Dec. 9, 1998 concerning the issue of Geubelle not notifying the petitioner's lawful insurance company, EMC, of Groth's accident and lawsuit. (R.O.A., Vol. 2, p. 316) The standard of Kansas appellate review of the trial court's rulings for respondents' motions for summary judgment is stated in *Bergstrom*:

> "Summary judgment is appropriate under K.S.A. 60-256 if . . . the movant is entitled to judgment as a matter of law.' The Court must resolve all facts

> and inferences reasonably drawn in favor of the non movant." *Bergstrom* (op. cit.)

The appellate court rendered judgment, without regard to *Bergstrom*'s instructions that the movant be entitled to judgment as a matter of law, when it found, without precedent, that the petitioner did not have fiduciary relationships with any of three defendant entities.

The petitioner's initial knowledge of the particulars involved in the production of the fraudulent policy was far too limited to allege fraud with the particularity required by K.S.A. 60-207(b). In March 1998, the petitioner filed a complaint with the insurance commissioner against all those who he knew limited to: Geubelle, The Agency, Cauldron and ASI. An investigator required ASI et. al. to furnish copies of logs and other documents. ASI et. al. altered the furnished copies of logs rendering them unreasable until treatment by the petitioner in March 1999. (R.O.A., Vol. 4, p. 109-119) This alteration constitutes fraudulent concealment that bars the application of statutes and limitations.

The petitioner's cause of action against Ecrement, et. al. raises the issue of the fraud discovery day in March 1999.

> . . . The Plaintiff (Sellens) claims in his response to these motions that he discovered the fraud when he reviewed certain logs in March of 1999 and that he should be permitted additional discovery to attempt to defeat the statute of limitations bar." (R.O.A., Vol. 6, p. 429, no. 9)

The trial court's finding recognized the fraud discovery date in March 1999 for fraudulent acts committed by McClellan, Ecrement, Eisele, Marquez, and Cauldron but still assigned the date for starting the clock for fraud discovery in December 1997. On another issue pertaining

to untimeliness, Chalmers, attorney for Ecrement, et. al., stipulated that there would not be a challenge on the basis of untimeliness if ASI's own litigation, 98 C 13, were dismissed. (R.O.A., Vol. 3, p. 29, no. A) The petitioner called this to the trial court's attention several times without disagreement from any party. (R.O.A., Vol. 3, p. 44, para. 2) (R.O.A., Vol. 6, p. 316, para. 6 - p. 317, para. 1)

In *Anderson v. Bill Morris Constr. Co. Inc.*, 25 K.A.2d 603, 606, 966, P.2d 96 (1998), the Kansas Court of Appeals addressed the issue of an untimely appeal and quoted from 4A Wright and Miller, Federal Practice and Procedure: Civil 2d paragraph 1168 (1987), as follows:

> "When employed in the context of an untimely appeal, . . . The Supreme Court seems to have concluded that a party ought not be denied an opportunity to appeal because of his failure to file a timely appeal *when that failure resulted from reliance on action taken by the district court that generated a reasponable belief that an appeal could be initiated at a later date.*" (Emphasis added)

Under a theory of unique circumstances, the petitioner was entitled to rely on what appeared to him to be a commitment that his issues could be continued in this instant case. The appellate court dismissed the issue by explaining that it didn't: ". . . feel compelled to reach the merits of Sellens' argument that the district court erred by . . . (4) erroneously granting the motions to dismiss . . . McClellan, . . . Ecrement, . . . Eisele, and . . . Cauldron. . . ."[2]

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[2]The issue of the Kansas Judicial System's disregard for the necessity of precedents was before this Court in Sellens et ux. v. Groth, et al., Docket No. 04-982. In the related case, the trial

[footnote continued]

As with Marquez, these respondents' fraudulent acts were committed in March through July of 1998. (R.O.A., Vol. 4, p. 78, 133 & 150) (R.O.A., Vol. 6, p. 117, 200) (R.O.A., Vol. 7, p. 96 & p. 99) As with Marquez, the appellate court's opinion starts the clock for discovering fraud three (3) to seven (7) months before the fraudulent acts were committed. As with Marquez, no authority was cited as a precedent in which the effective time for fraud discovery sounding in tort had been reduced from two (2) years to seventeen (17) months.

In ruling favorably for respondents' motions for summary judgment and motions to dismiss, the appellate court stated that the plaintiff ". . . . cannot simply rely on his own averments to create genuine issues of material fact." However, Cauldron, McClellan, Ecrement, and Eisele only responded to the petitioner's petition with motions to dismiss thereby admitting to the truthfulness of the petitioner's allegations. The petitioner is entitled to rely on his own averments to create genuine issues of material fact pertaining to Cauldron, McClellan, Ecrement, and Eisele. See *Robertson* (op. Cit.) (Cited in *Weil*, op. cit.)

Statutory accrual of the petitioner's cause of action is governed by K.S.A. 2003 Supp. 60-513(b) which includes; ". . . the causes of action listed in subsection (a) shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial in-

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court was quite open about its disregard for the rule of law. It was most graphic during a July 16, 2002 hearing in which the petitioner began to cite *Phillips v. Carson* as a governing precedent for justifying deposing certain shareholders of the defendant law firm. The trial court cut him off with: "I don't want any case law." This Court denied the petitioner's Petition for Writ of Certiorari on March 28, 2005.

jury, . ." The petitioner did not suffer non recoverable damages until the time frame ended for the special Japanese government program for importing housing. (R.O.A., Vol. 7, p. 25, no. 28) He filed his petition less than one (1) year later. (R.O.A., Vol. 7, p. 25, no. 29)

Additionally, *Bryson v. Wichita State University*, is a relevant precedent that states: "Issue when substantial injury first appeared or been reasonably ascertainable in fraud case is a question of fact not proper for decision by summary judgment." 19 K.A. 2d 1104, 1106, 880 P.2d 800 (1994)

The petitioner's petition was not untimely but even if it had been, the circumstances in this case are so egregious as to render the application of any statute of limitations unconsciounable. The source for this position is contained in "Waiver of bar of statute: estoppel" D. Kan. "Under New York law, promissory estoppel may bar application of the Statute of Frauds if the circumstances are so egregious as to render the application unconscionable. N.Y. McKinney's general Obligations Law para. 5-701, subd. a, par. 1" cited in *Mellon v. Cessna Aircraft Co.*, 28 F.Supp. 2d 1304 (1998).

In his pleadings, the petitioner identified violations of Kansas Supreme Court Rule 165 that requires the trial court to state the controlling facts required by K.S.A. 60-252 and the legal principles controlling the decision. The petitioner cited rule 165 violations in the issue of incomplete discovery; the opinion that there was no contract between Marquez and himself; the dismissal of his cause of action against McClellan, Ecrement, Eisele, and Cauldron; the court's granting numerous motions by defendants for protective orders, and the opinion that there was no contract between and among the petitioner, The Agency and Geubelle.

The district court could not have made its rulings had it properly observed its *Hanks* mandate. "In entering summary judgment pursuant to K.S.A. 60-256, a district court is required by Supreme Court Rule 165 to state the controlling facts and the legal principles controlling the decision." *Hanks v. Riffe Constr. Co.*, 232 Kan. 800, 802, 658 P.2d 1030 (1983)

The record shows that the Kansas Judicial System has ignored its own rules, numerous case precedents and several governing statutes in this instant action. In so doing, the Kansas Judicial System has denied the petitioner with equal protection of its laws guaranteed him by the fourteenth amendment to the U.S. Constitution which instructs:

> ". . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Founding fathers of the U.S. and Kansas have granted the petitioner the right to a jury trial, guaranteeing him with protection from being subjected to any judge's personal preference for how a case should be resolved. The right to a trial by jury was a privilege held by American subjects of English King George III in 1776. Yet, the signers of the Declaration of Independence needed more and described numerous ways in which King George III had attempted to enforce "an absolute tyranny over these states." The right to a trial by jury is widely believed to be one of American's most cherished rights and one which the petitioner does not want to see replaced by unlimited discretion of Kansas district court judges.

Section 5, of the Constitution Of The State Of Kansas and Article VII of the US Constitution grants the petitioner the right to a jury trial. The appellate court dismissed the issue with the opinion that the issue: ". . . requires no discussion for anyone with a modicum of legal knowledge." The petitioner is due more than dismissive language to explain his apparent loss of constitutional rights to trial by jury. This Court should grant this petition for writ so this question can be answered for the information and benefit of every U.S. citizen.

In *Rumsfeld,* this Court considered the constitutional rights of Padilla, who had been designated by the U.S. President as an "enemy combatant" . . . . "Based on the information available to [him] from all sources . . . ." and that Padilla is ". . . . closely associated with al Qaeda, an international terrorist organization with which the United States is at war." *Rumsfeld v. Padilla et. al.*, Docket No. 03-1027, Decided June 28, 2004.

With all due respect to this Court, given the importance it places on the constitutional rights of citizens with standings like Padilla, citizens with standings like the petitioner are due more than the Kansas Appellate Courts dismissal of the petitioner's expectations for decisions based on the rule of law as simply being . . . "pro se fantasies".

II.

BECAUSE THE FINDINGS ARE IN CONFLICT WITH INSTRUCTIVE LANGUAGE IN KANSAS STATUTES, PREVIOUS KANSAS DECISIONS, AND ARE FURTHER IN CONFLICT WITH DECISIONS OF THIS COURT, OTHER FEDERAL COURTS OF APPEALS, AND OTHER STATE SUPREME COURTS.

United States v. Morrison et al., No. 99–5 2001 invites scrutiny of the Appellate Court's opinion under the reading that laws should be uniform throughout the nation. The petitioner can not find any precedent in Kansas, nor in any other state, with a similar fact situation and no other party has cited any. However, there are scores of Kansas cases that provide guidance that the petitioner does have causes of action against the respondents including:

Marshel Investments, Inc. v. Cohen, Kan. App. 634 P.2d 123 which sets forth the history of well established principle of law that an insurance agent or broker who undertakes to procure insurance for another and thereafter neglects or fails to do so, *will be held liable for any damage resulting therefrom.* (Emphasis added)

In *Marker v. Preferred Fire Ins. Co.*, 211 Kan. 427, 506 P.2d 1163 (1973), the opinion includes:

> . . . . "In support of this position plaintiff relies upon the well established principle of law that an insurance agent or broker who undertakes to procure insurance for another and thereafter neglects or fails to do so, *will be held liable for any damage resulting therefrom.*" (Emphasis added)

Both *Marshel* and *Marker* instruct that the agent or broker is to be held accountable for any damages and can not be read to exclude the petitioner in this instant case. The Kansas Judicial System seemingly opted to ignore

the *Marshel* and *Marker* guidance and exclude the petitioner from any cause of action then further opted not to publish what would have been its dramatic precedent altering opinion.

There are scores of precedent setting cases in other jurisdictions in which the courts have properly recognized that insurance companies and/or their agents do not have privileged status. Some include the Michigan Supreme Court's observation that the tripartite relations among an insurance company, its insured, and legal counsel employed to defend its insured carries:

> ". . . . rife possibilities of conflict which unquestionably runs against the insured, considering that defense counsel and the insurer frequently have a long standing, if not collegial, relations." *Atlantic International Insurance Co. v. Bell,* 475 N.W.2d 294 (1991)

In *Tank,* the State of Washington Court included:

> "The potential conflict of interest between an insured . . . mandate an even higher standard: an insurance company must fulfill an enhanced obligation to its insured as part of its duty of good faith. Failure to satisfy this enhanced obligation may result in liability of the company or retained defense counsel, or both." *Tank v. State Farm Fire & Ascualty Co.,* 105 Wash. 2d 381, 715 P.2d 1133 (1986).

Pacific Mutual Life Insurance Co. v. Haslip et al. includes:

> ". . . . Alabama's longstanding common-law rule that an insurer is liable for both compensatory and punitive damages for the intentional fraud of its agent effected within the scope of his employment

> rationally advances the State's interest in minimizing fraud, since that rule creates a strong financial incentive for vigilance by insurers." (89-1279), 499 U.S. 1 (1991)

The absence of precedent citations by any party, numerous rulings that conflict with Kansas statutes and case law, and the refusal to publish what would be a dramatic precedent opinion, are central to the petitioner's appeal to this Court. The petitioner asserts that there is no statute or precedent case supporting the opinion in this instant case. Any authority that would deny a named insured equal protection with his/her insurance company and/or agent would be under continuous challenge for being in violation of Amendment XIV to the U.S. Constitution. An issue in deciding if there has been a violation of the protection guaranteed by the fourteenth amendment has often been in determining if the act can be attributed to the State. The purpose and effect of the fourteenth amendment was clearly stated by Mr. Justice Bradley in the case of *U.S. v. Cruikshank,* 1 *Woods* 316:

> "It is a guaranty of protection against the acts of the state government itself. It is a guaranty against the exertion of arbitrary and tyrannical power on the part of the government and legislature of the state, ..."

Other cases include *Virginia v. Rives,* 100 U.S. 313, in which is stated: ". . . . these provisions of the fourteenth amendment have reference to state action exclusively, and not to any action of private individuals." *Lugar* includes: "State action requires both an alleged constitutional deprivation caused by acts taken pursuant to state law and that the allegedly unconstitutional conduct be

fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937.

Under *Cruikshank, Rives* and *Lugar*'s guideposts, this case should be neither close nor difficult. K.S.A. 40-2, 118, Fraudulent Insurance Act, is a special statute that has been enacted by the state of Kansas thus it takes precedent over common law and other statutes. "When a statute conflicts with the common law, the statute controls". *Taiwo v. Vu*, 822 P.2d 1028 (Kan. 1991) "A special statute relating to particular persons or things takes precedence over general statute." *Stanton v. KCC*, 2 K.A.2d 228, 229, 577 P.2d 1201. If this special statute does not provide the petitioner equal protection with ASI and its agents it is obviously in violation of the equal protection clause of the fourteenth amendment to the U.S. Constitution.

III.

BECAUSE KANSAS COURTS WILL CONTINUE TO IGNORE STATE STATUTES, CASE LAW, AND THEIR OWN RULES UNTIL THE ISSUE IS RESOLVED BY THIS COURT.

The unpublished opinion in this case is valuable for this Court because it presents an easily recognized written record of the lack of constraint by the Kansas Judicial System.[3] The more common complaint, in the federal

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[3]The issue of the Kansas Court of Appeals' issuing dispositive opinions without stating reasons was before this Court in Sellens, et ux. v. Groth et al., Docket No. 04-982. In the related case, the Kansas Appellate Courts affirmed the trial court's decision with: "The district court's detailed written ruling is sufficient to support a summary affirmance on the summary judgment issue. Affirmed under Supreme Court Rule 7.042-(d) (203 Kan. C.R. Annot. 50)." This Court denied the petitioner's Petition for Writ of Certiorari on March 28, 2005.

court appellate court system, is of no written record at all of reasons for decisions.

> "The most dramatic evidence of the importance which attorneys attach to a written record of the reason for a decision can be found in the view expressed by more than two-thirds of the attorneys surveyed that the due process clause of the constitution should be held to require courts of appeals to write at least a brief statement of the reasons for their decisions." – *Recommendations For Change 50,* Commission On Revision Of The Federal Court Appellate System, Structures and Internal Procedures. (1975)

The petitioner is before this Court complaining of the arbitrary and tyrannical opinions collectively rendered by the Kansas Judicial System. He is further complaining of the Kansas judicial system's nearly incontestable ability to issue unpublished opinions without regard to the rule of law. Black's Law Dictionary 1092 (6th ed. 1990) defines "opinion" as a statement by a judge or a court of the decision reached to a cause tried or argued before them, expounding the law as applied to the case, and detailing the reasons upon which the judgment is based. The opinion in this instant case is void of required law and/or reasons.

The petitioner filed a motion to publish the opinion identifying the inattention given to the rule of law. He cited K.S.A. 60-2106 and Kan. Ct.R. Anno. 7.04(a) that dictates publication of opinions that establishes new rules of law. K.S.A. 60-228(c) identifies expectations that reporters be unbiased and objective. The record in this instant case identifies a situation in which a reporter has been anything but unbiased and objective and has been permitted to withhold the petitioner's evidence. This

situation decides new rules of law pertaining to K.S.A. 60-228(c) that meets cited grounds for publication.

K.S.A. 2003 Supp. 60-513(b) includes: . . . . "the causes of action listed in subsection (a) shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury" . . . . The unpublished opinion would establish new rules of law that meets cited grounds for publication by rendering moot the instructions in K.S.A. 2003 Supp. 60-513(b).

K.S.A. 60-215 governs filing amended petitions but does not instruct a litigant to submit a copy of the proposed amended petition with the motion. The appellate court's opinion requires a copy of the proposed amended petition to be attached to the motion. The appellate court's opinion establishes new rules of law that meets cited grounds for publication.

Kan. Ct.R. Anno. 7.04(b) dictates publication of opinions that involves legal issues continuing public interest. The complex, tripartite relationship among (i) statutes, case laws, and municipal requirements demanding purchase of liability insurance; (ii) the multi-billion dollar insurance industry itself; and (iii) the insurance industry's command clients, the general public; makes the unpublished opinion a legal issue of profound continuing public interest thus Kan. Ct.R. Anno. 7.04(b) mandates publication.

Kan. Ct.R. Anno. 7.04(a) dictates publication of opinions that modify rules of law. *Bailey v. Talbert* (op. cit.) provides that: "Where one has agreed and definitely bound himself to perform contract, he cannot be heard to say that he cannot do so." *Meyer v. Diesel Equipment Co., Inc.*, (op. cit.) instructs: "When one contracts to perform an act possible in itself, he will be liable for

a breach thereof . . . ." The appellate court's opinion that: ". . . . the contract was between American States and IES and any cause of action for the changing of the named insured would lie with the corporation." modifies *Bailey* and *Meyer* thus meeting Kan. Ct.R. Anno. 7.04(a) standards mandating publication.

Cauldron, McClellan, Ecrement, and Eisele only responded to the petitioner's petition with motions to dismiss. *Robertson* (op. cit.) (Cited in *Weil,* op. cit.) instructs: ". . . . The motion in such case may be treated as the modern equivalent of a demurrer." The appellate court's opinion requiring the petitioner to come forth with evidence to hold his claim against these four respondents' motions to dismiss modifies *Robertson* and *Weil* thus meeting Rule 7.04(a) publication standards.

Jenkins v. McCormick, 339 P.2d 8, 184, Kan. 842, and *Tetuan v. A.H. Robins Co.,* 738 P.2d 1210, 241 Kan. 441 (1987) instructs that if facts are concealed that are particularly within knowledge of one party and of such a nature that the other is justified in assuming their non existence, there is a duty of disclosure, and deliberate suppression of such fact is fraud.

Friends University v. W.R. Grace & Co., 227 Kan. 559, 564, 608 P.2d 936 (1980) includes that caveat that: ". . . . in the absence of a fiduciary or confidential relationship, there must be something of an affirmative nature designed to prevent . . . ." The unpublished opinion in this case modifies *Jenkins, Tetuan* and *Friends University* by deleting the language that imposes more stringent standards on parties committing fraud against persons with whom they have a fiduciary relationship. This change mandates the opinion's publication per Kan. Ct.R. Anno. 7.04(a).

Gottstein National Ass'n for Self-Employed, 53 F. Supp. 21, 1212 Kan. (1999) instructs: ". . . . Under Kansas law, fiduciary relations may be created contractual, e.g. attorney/client or implied from the circumstance . . . .". The unpublished opinion rendering the petitioner without contractual rights modifies *Gottstein* meeting Kan. Ct.R. Anno. 7.04(a) publication standards.

Keith v. Schiefen-Stockham Insurance Agency, Inc., instructs:

> "A broker or agent who undertakes to procure insurance for another and through his fault or neglect fails to do so will be held liable for any damage resulting therefrom; agent has duty to exercise reasonable care, skill and diligence in effecting the insurance, and may be sued for breach of contract or negligent default in performance of duty imposed by contract." *Keith,* 498 P.2d 265 (1972).

The unpublished opinion renders the petitioner without contractual rights with The Agency and Geubelle thereby modifies *Keith* by limiting its applicability of damages to IES. The opinion effectively deletes *Keith*'s language of: ". . . . will be held liable for any damage resulting therefrom . . . ." thus meeting Kan. Ct.R. Anno. 7.04(a) standards mandating publication.

In *West v. Prairie State Bank,* the court stated: "Summary judgment rendered only if no genuine issue as to any material fact and movant entitled to judgment as a matter of law." 200 K. 263, 267, 436 P.2d 402. The appellate court's opinion modified *West* by rendering judgment, without any precedent, when it found that the petitioner did not have fiduciary relationships with any of three defendant entities. These findings meet Kan. Ct.R. Anno. 7.04(a) standards mandating publication.

Re Dill, 253 Kan. 195, 8535 P.2d 696 (1993) and *re Jackson,* 255 Kan. 542, 874 P.2d 643 (1994) are precedent cases in which attorneys were sanctioned, in part, for failure to produce client files on demand. The appellate court opined that: ". . . . the district court found that the plaintiff had been given the opportunity to inspect and copy the file and that delivery of possession of the original file was not required." The unpublished opinion clearly modifies *Dill* and *Jackson,* thus mandating publication per Kan. Ct.R. Anno. 7.04(a).

Bryson v. Wichita State University, (op. cit.) is a precedent case in which the Court ruled: "Issue when substantial injury first appeared or been reasonably ascertainable in fraud case is a question of fact not proper for decision by summary judgment." This opinion clearly modifies *Bryson* by ruling on the date when substantial injury first appeared in a fraud case thus it meets cited grounds for publication.

State v. Ford, 23 Kan. App.2d 248, 241, 930 P.2d 1089 (1996) and *State v. Collins,* 195 Kan. 659, 700, 408 P.2d 639 (1965) instructs that:

> ". . . . the discretion lodged within a court is not a boundless, but a judicial discretion . . . with regard to what is right and equitable under the circumstance and law."

The unpublished opinion modifies *Ford* and *Collins* by making "judicial discretion" boundless thus meets cited grounds for publication.

Kan. Ct.R. Anno. 7.04(d) dictates publication of opinions that applies an established rule of law to a factual situation significantly different from that in published opinions of the courts of this state. The issues in this instance case are factual situations significantly dif-

ferent from those in published opinions of the state of Kansas thus deserving of publication.

It was simply not possible to publish the opinion without rendering several Kansas statutes moot and dramatically modifying existing case law. Instead of reversing the faux opinion, the Kansas Supreme Court simply denied the motion to publish. (App. 17a)

The petitioner can not find any academic research studying abuses permitted by unpublished, dispositive opinions in Kansas. However, there is anecdotal evidence that citizen maltreatment by judicial authorities is widespread. Reynolds & Williams studied numbers and effects of unpublished opinions in the federal circuit courts. Their study revealed in the 1978-79 reporting years, over sixty percent (60%) of appeals were being dispose of via unpublished opinions. See William Reynolds & William Richard, *An Evaluation of Limited Publication in the United States Court of Appeals: The Price of Reform*, 48 U. Chi. L. Rev. 573, 586 (1981). Reynolds and Richman were critical of the quality of the unpublished opinions and stated, ". . . anyone who reads even a small number of unpublished opinions must conclude, given their brevity and informality, that considerable effort has been spared in their preparation." They examined the degree that each circuit court stated its rational for it rulings and reported that fifty-nine percent (59%) of the unpublished opinions were made with ". . . no discernable justification." Reynolds & Richman 594-95 (op. cit.)

Chief Judge Howard T. Markey spoke in the vernacular and called unpublished opinions "junk". *Remarks at the Seventh Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 128

F.R.D. 409, 413 (1989). In a speech at Washington Hebrew Congregation, Justice Scalia was noted saying that while baseball umpires do not give reasons for their decisions, judges must. Antonin Scalia, *The Press And The Law.* (March 1990

Justice Stevens' dissenting opinion in *Connecticut Board of Pardons v. Dumschat* recognizes the need for explanations for decisions and assurances to litigants that like cases were being decided in a similar way:

> "The judges (in former times) were guided by few written laws, but developed a meaningful set of rules by the process of case-by-case adjudication. Their explanation of why they decided cases as they did provided guideposts for future decisions and an assurance to litigants that like cases were being decided in a similar way. Many of us believe that those statements of reason provided a better guarantee of justice than could possibly have been described in a code written in sufficient detail to be fit for Napoleon." 452 U.S. 458, 472 (1981) (Steven, J., dissenting)

IV.

THIS CASE SHOULD BE NEITHER CLOSE NOR DIFFICULT TO DECIDE. NO FACTS ARE IN DISPUTE. GRANTING THE WRIT IS NECESSARY TO BEGIN THE PROCESS OF REINSTATING THE RULE OF LAW IN KANSAS.

The impact of this Court granting the writ will be tremendous. This petition identifies a faux opinion that would decide new questions of law; be valuable as precedents; establish new rules of law; involve legal issues continuing public interest; explain existing laws; modify existing laws; apply established rules of law to factual situations significantly different from that in published

opinions of the courts of Kansas; resolve apparent conflict of authorities, yet went unpublished. This practice can not long be tolerated in a country that was founded because citizens demanded a government whose authorities were granted by those being governed. A government whose responsibilities and power to exact obedience were stated in its written constitution and bill of rights and where disputes were fairly administered by courts of law.

Judges in the Kansas Judicial System are clearly unconcerned about what has been thought to be the main constraint on judges, that being the obligation to reach decisions that are justified by the law and not simply the judge's personal preference for how a case should be resolved. See Philip Soper, *A Theory of Law* (1984).

There is no reason to believe that the Kansas Judicial System will reform itself. Until the issues have been resolved by this Court, judges in Kansas district courts will continue to make decisions based on only their personal preferences and the appellate system will continue to affirm these personal preferences without regard to the rule of law. This Court should grant review to resolve these issues and reinstate the rule of law in Kansas.

CONCLUSION

For the foregoing reasons, the petitioner respectfully submits that this Petition for a Writ of Certiorari to the supreme Court of Kansas should be granted.

Respectfully submitted,

CHARLES J. SELLENS
Plaintiff, *Pro se*
Uwabu Sakae-machi 10-7
Komagane-Shi;
Nagano-Ken 399-4115
Japan
81-265-82-4417

APPENDIX A

[Filed Mar 1 2005]

IN THE SUPREME COURT
OF THE STATE OF KANSAS

District Case No. 01C4 KE

Supreme Court Order
Case No. 03-90976-A

Charles J. Sellens
Uwabu Sakae-Machi 10-7
Komagane-Shi Nagano-Ken
399-4115 Japan

Pro Se

Case No. 03-90976-A

Charles J. Sellens, Appellant,

v.

American States Ins., Co., et al., Appellees.

You are hereby notified of the following action taken by the Court:

Petition for Review by Charles J. Sellens Pro se

Considered by the Court and denied.

Date: 03/01/2005.

Carol G. Green
Clerk

APPENDIX B

[Filed December 18, 2004]

[NOT DESIGNATED FOR PUBLICATION]

No. 90,976

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

CHARLES J. SELLENS,

Appellant,

v.

AMERICAN STATES INSURANCE COMPANY, *et al.*,
Appellees.

MEMORANDUM OPINION

Appeal from Kearny District Court; THOMAS F. RICHARDSON, Judge.

Opinion filed September 24, 2005. Affirmed.

Charles J. Sellens, appellant pro se.

Jason R. Whitener, of Gehrt & Roberts, Chartered, of Topeka, for appellees The Agency and Doug Geubelle.

Arthur S. Chalmer, of Hite, Fanning & Honeyman, L.L.P., of Wichita, for appellee American States Insurance Company.

Before JOHNSON, P.J., MALONE, and HILL, JJ.

Per Curiam: Charles Sellens appeals the dismissal of his claims against a host of named defendants and raises numerous alleged trial errors. Sellens' pro se brief enumerates 35 issues, many of which are obfuscated and all of which are without merit. We affirm.

The parties are familiar with the facts, and we will not recite them here. We do observe that apparently a coloring factor in the filing of this lawsuit was Sellens' belief that the named defendants conspired against him in retaliation for a boundary dispute Sellens previously had with Steve McCormick. McCormick was apparently on the board of directors of The Agency, which was the agent for American States Insurance Company (American States), which issued a general liability policy that was involved in the dipute.

Sellens offers several arguments challenging the propriety of the granting of summary judgment, designating each argument as a separate issue. We take the liberty of attempting to reorganize and group the issues for discussion. Sellens challenges the propriety of the district court ruling on summary judgment motions prior to ruling on his motion for a change of judge. He offers a factual account of his change of judge motion but fails to present legal argument and authority. Pursuant to supreme court rule 6.02(e) 2003 Kan. Ct. R. Annot. 35) the issue is not properly briefed and we need not address it. See *Enlow v. Sears, Roebuck & Co.*, 249 Kan. 732, 744, 822 P.2d 617 (1991). We do note, however, that the record would not support Sellens' position.

Sellens argues that the district court limited his discovery, impairing his ability to respond to the summary judgment motions. He fails to identify the relevant evidence which he was unable to discover.

> "Ordinarily, a motion for summary judgment should not be granted when the opposing party is proceeding diligently with his pretrial discovery, but has not had an opportunity to complete it. [Citations omitted.] On the other hand, when . . . a party makes no suggestion to the trial court of any additional facts tending to support his position, he cannot escape summary judgment, if other proper, on the mere hope that further discovery may reveal evidence favorable to his case [Citations omitted.]" *Gray v. Ray Gill, Frontier Industries, Inc.*, 208 Kan. 95, 97, 490 P.2d 615 (1971). See *In re Application for Incorporation as City*, 241 Kan. 396, 406, 736 P.2d 875 (1987). The district court was not required to allow Sellens to continue of his fishing expedition.

Obviously, the core issue is whether summary judgment was appropriate. We employ the familiar standard of review which states, *inter alia*, that the party opposing summary judgment must come forward with evidence to establish a dispute as to a material fact. See *Bergstrom v. Noah*, 266 Kan. 847, 871-72, 974 P.2d 531 (1999).

Sellens identifies several facts which he contends are material and disputed. He fails to recognize, however, that he cannot simply rely on his own averments to create genuine issues of material fact. In *Willard v. City of Kansas City*, 235 Kan. 655, 657, 681 P.2d 1067 (1984), the Kansas Supreme Court commented:

> "This court has also emphasized the responsibility of a party opposing summary judgment to take steps to provide evidence by way of depositions or affidavits in opposing to the motion or if necessary to request time to make additional discovery. The nonmoving party cannot rely solely upon the allegations in his pleading. He must come forward with

something of evidentiary value to justify his position. [Citations omitted.]"

Sellens specifically challenges the district court's conclusion that Sellens' claims were barred by the statute of limitations and that his breach of contract claims failed as a matter of law. We conclude summary judgment was proper in both respects. Sellens filed his petition on February 7, 2000, alleging claims for fraud, breach of contract, fraud by concealment of silence, totruous interference with a prospective business advantage, and intentional infliction of emotional distress against all of the named defendants. The following statute of limitation, limiting certain actions to 2 years, governs Sellens' tort claims:

"(a) The following actions shall be brought within two years: . .

(3) An action for relief on the ground of fraud, but the cause of action shall not be deemed to have accrued until the fraud is discovered.

(4) an action for injury to the rights of another, nor arising on contract, and not herein enumerated." K.S.A. 2003 Supp. 60-513(a).

K.S.A. 2003 Supp. 60-513 also includes two accrual provisions. The provision relevant to this case provides, in pertinent part:

"(b) Except as provided in subsection (c) and (d), the causes of actions listed in subsection (a) shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes

reasonably ascertainable to the injured party . . ." K.S.A. 2003 Supp. 60-513(b).

Sellens' claims for tortuous interference with a prospective business advantage and intentional infliction of emotional distress, were founded upon two acts: (1) The issuance of the general liability insurance policy to Sellens individually rather than to his corporation and (2) a conflict of interest of the attorney hired by the insurance company to defend Sellens. The record establishes that Sellens perceived no later than December 1997, that he had been injured by defendants' actions, and, thus, the clock began running; his February 2000 claim was untimely.

Sellens' fraud claims were subject to a 2-year limitation under K.S.A. 2003 Supp. 60-513(a)(3). A cause of action for fraud "shall not be deemed to have accrued until the fraud is discovered." K.S.A. 2003 Supp. 60-513(a)(3). "The statute of limitations in an action for relief on the ground of fraud does not start to run until the plaintiff discovers the fraud or until the plaintiff learns such facts as would lead a reasonably prudent person to investigate." *Robinson v. Shah*, 23 Kan. App.2d 812, Syl. ¶ 5, 936 P.2d 784 (1997).

Again, the record supports a finding that by December 1997 Sellens had learned of sufficient facts which would lead a reasonable person to investigate. Therefore, the district court did not err in finding the fraud causes of action were barred by the statute of limitations.

Sellens makes the additional argument that (1) the statute of limitations was tolled for a variety of reasons, (2) estoppel barred the assertion of a statute of limitations defense, and (3) the court's finding regarding the commencement of the statute of limitations is not supported by the evidence.

First, Sellens contends that American States' fraudulent concealment of facts tolled the statute of limitations. In *Friends University v. W.R. Grace & Co.*, 227 Kan. 559, 564, 608 P.2d 936 (1980) (quoting 51 Am. Jur. 2d, Limitation of Actions § 148, pp. 719-21), the Kansas Supreme Court commented:

> "To constitute concealment of a cause of action within the general rule tolling the statute of limitations on that ground the concealment must be fraudulent or intentional and, in the absence of a fiduciary or confidential relationship, there must be something of an affirmative nature designed to prevent, and which does prevent, discovery of the cause of action. There must be some actual artifice to prevent knowledge of the fact, some affirmative act of concealment, or some misrepresentation to exclude suspicion and prevent injury. . . .
>
> "There can be no concealment which will prevent the running the statute of limitations where the cause of action is known to the plaintiff or there is a presumption of such knowledge. Where the defendant does not occupy a fiduciary or confidential relationship toward the plaintiff, neither affirmative nor passive conduct of the defendant will constitute such a concealment as to prevent the running of the statute of limitations, where through reasonable diligence on his part he could have learned of the existence of his cause of action. It has accordingly been held that the party seeking to toll the statute of limitations must explain why due diligence did lead or could not have led to discovery of the facts and the cause action.' "

We have carefully reviewed the three acts which Sellens claims illustrate American States' fraudulent concealment and find nothing which would have prevented

Sellens from discovering his alleged causes of action. Sellens' allegation that his attorney, Richard Marquez, concealed the case file from a prior lawsuit involving Brian Groth is not accompanied by any explanation of what evidence contained in the file of which Sellens was unaware. Sellens' conclusory allegations do not permit a determination of whether Marguez's actions actually prevented Sellens from discovering his alleged causes of action. "[T]here must be something of an affirmative nature designed to prevent, and which does prevent, discovery of the cause of action.' " (Emphasis added.) *Friends*, 227 Kan. at 564 (quoting 51 Am. Jur. 2d, Limitation of Actions § 148, p. 719).

Sellens asserts that his complaint to the Insurance Commissioner tolled the statute of limitations during the pendency of that proceeding. He relies on *Keith v. Schiefen-Stockham Insurance Agency, Inc.*, 209 Kan. 537, 544, 498 P.2d 265 (1972), in which the Kansas Supreme Court stated:

> " 'The rule in this jurisdiction is that if a person is prevented from exercising his legal remedy by the pendency of legal proceedings, the running of the statute of limitations applicable to the remedy is postponed or if it has commenced to run, is suspended or tolled during the time the restraint incident to the proceeding continues." (Quoting *In re Estate of Brasfield*, 168 Kan. 376, Syl. ¶ 7, 214 P.2d 305 [1950].)

Again, however, Sellens fails to explain how he was prevented from bringing the present lawsuit. A review of the Kansas statutes and regulations relating to insurance does not disclose that the filing of a complaint with the Insurance Commissioner, standing alone, prevents

the complainant from filing a lawsuit in district court. Sellens' reliance on *Keith* is misplaced.

Sellens also contends that the statute of limitations was tolled under the federal tolling doctrine. According to the federal tolling doctrine, " '[W]here the party injured by the fraud remains in ignorance of it without any fault of want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered. . . .' " *Seiffer v. Topsy's International, Inc.*, 520 F.2d 795, 796 (10th Cir. 1975) (quoting *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348, 22 L.Ed. 636 [1874]). Sellens fails to cite to any Kansas case applying the federal tolling doctrine, perhaps because such a case does not exist.

Moving to Sellens' estoppel arguments, we note that he lists three reasons why the defendants should have been estopped from asserting a statute of limitations defense. In the first, he contends that American States made a "pledge" to the Insurance Commissioner that this controversy would be resolved in the district court. The contention is unsupported by the record; Sellens bore the burden of designating a sufficient record to substantiate his arguments. See *Sterba v. Jay*, 249 Kan. 270, 280, 816 P.2d 379 (1991). Next, Sellens makes a nonsensical argument that the defendants are estopped from asserting the statute of limitations defense by their own acts. He cites no support for his position, and to the extent that one might divine the legal nature of the argument, we have no problem finding that it must be without merit.

Thirdly, Sellens cites *Melon v. Cessna Aircraft Co.*, 28 F. Supp. 2d 1305, 1308 (D. Kan. 1998), which discussed New York law regarding promissory estoppel and

the statute of frauds, as authority for his argument that the application of statutes of limitation may be barred under egregious circumstances. Sellens' reliance on *Sellens* interpretation of New York statute of frauds law in support of a Kansas statute of limitations issue simply illustrates the consequences of a pro se litigant, without the requisite legal acumen, embarking on an apparently enjoyable, adventurous journey through the legal system. Perhaps we are ill-advised to encourage such pro se fantasies by not simply summarily affirming the district court. Nevertheless, the cited authority is not mandatory, persuasive, or germane.

Last, Sellens contends that the district court, during an unrecorded hearing in a separate lawsuit, "committed" to allowing Sellens to bring the present lawsuit. Consequently, Sellens maintains that the district court should be precluded from dismissing Sellens' case on untimeliness grounds. The argument has no support in the record and fails.

Moving on to the contract issues, we note that Sellens contends the district court should have found the existence of contract between; (1) American States and Sellens; (2) Marquez and Sellens; and (3) The Agency, Doug Geubelle, and Sellens. The point is that if those contracts existed, the claims based upon contract would not be barred by the statute of limitations.

Sellens first asserts that there was a contract between himself and American States because "American States imposed contractual obligations upon itself" when it issued the policy in Sellens' and his brother's names instead of Sellens' corporation, International Education Services, Inc. (IES). Sellens' initial complaint was that the insurance policy was issued in individual names, when

he had contracted on behalf of IES for the policy to be issued to the corporation. Therefore, under his theory, the contract was between American States and IES and any cause of action for the changing of the named insured would lie with the corporation. We find no error.

Next, Sellens asserts a contract between himself and Marquez, who was hired by American states to represent Sellens. The alleged breach of that contract was Marquez' representing the insurance company's interest in derogation of Sellens' interests. Thus, notwithstanding any contractual relationship, Sellens' cause of action sounded in tort rather than contract.

> "Legal and medical malpractice generally constitutes both a tort and a breach of contract. An action for liability of an attorney on the grounds of negligence for failure to discharge his professional duty to a client rests on the employment contract and therefore in contractual in nature. Where the act complained of is a breach of specific terms of the contract without any reference to the legal duties imposed by law upon the relationship created thereby, the action is contractual. Where the essential claim of the action is a breach a duty imposed by law upon the relationship of attorney/client and not of the contract itself, the action is in tort. [Citation omitted.] . . ."

". . . Kansas has held that where a legal duty is imposed by law, the cause of action is in tort." *Pencake House, Inc. v. Redmond,* 239 Kan. 83, 85-86, 716 P.2d 575 (1986).

Finally, Sellens argues that the court erred by failing to find a contract between himself, Geubelle, and The Agency. As was the case with American States, any breach of contract claim seems to be with the corpora-

tion rather than Sellens. IES employed Geubelle and the Agency to procure the insurance policy. A cause of action for breach of contract in procuring the policy should rest with IES.

Sellens concludes his shotgun challenge to summary judgment by contending that the district court's findings were not supported by the evidence. Again, Sellens frequently misses the point. For instance, Sellens argues that the district court erred in finding that Sellens had assessed his damages at $60,000 in December 1997 because that was the figure upon which Sellens said he was willing to settle, not his actual damages. However, the finding is relevant to Sellens' knowledge that he had sustained damages at that early date, thus commencing the statute of limitations period, rather than being germane to the amount of damages incurred. Likewise, Sellens' other complaints are unpersuasive.

Given our previous rulings, we do not feel compelled to reach the merits of Sellens' arguments that the district court erred by (1) failing to find the defendants in violation of K.S.A. 40-2, 118; (2) denying Sellens' claim of fraud by concealment of silence; (3) failing to find the insurance agent bound coverage; and (4) erroneously granting the motions to dismiss of Claire F. McClellan, Jack D. Ecrement, Carl B. Eisele, and Carlos Cauldron. With respect to the dismissal of Patricia I. Smith, a review of the record and applicable statutes reveals that the district court did not error in dismissing her from the lawsuit following a remand from this court.

In his challenge to the district court's limitation of discovery, Sellens follows his pattern of citing to inapplicable authority and misconstruing the facts. *Brakefield v. Shelton*, 76 Kan. 451, 92 Pac. 709 (1907), stands for the proposition that in a civil trial based upon fraud,

the district court should afford great latitude in the introduction of evidence tending to disclose the alleged fraud. It does not instruct the district judge to permit interrogatories to one defendant containing 260 questions. Sellens' contention that the 260 questions were, in fact, a deposition upon written questions would have more force if he had not labeled the discovery "Interrogatories to Defendant The Agency." Further, the record indicates the parties' scheduling conflicts prevented Geubelle's deposition, rendering the allegation that the district judge prevented the deposition disingenuous, at best.

Continuing our herculean efforts to decipher Sellens' arguments, we perceive his complaint concerning the denial of his motion to compel to be that the district court should have ordered Marquez to turn over the entire case file from the prior lawsuit. Inexplicably, Sellens cites to the Model Rules of Professional Conduct for authority. See Supreme Court Rule 226 (2003 Kan. Ct. R. Annot. 317). Nevertheless, the district court found that Sellens had been given the opportunity to inspect and copy the file and that delivery of possession of the original file was not required. We agree.

Sellens also complains of the district court's denial of his request for discovery sanctions. "The award of sanctions, including attorney fees, for discovery violations is also reviewed using an abuse of discretion standard." *Canaan v. Bartee*, 276 Kan. 116, 135, 72 P.3d 911 (2003). Our review of the record discloses no discovery violations and, thus, it certainly was not an abuse of discretion to deny sanctions.

Below, Sellens moved for production of Marquez' correspondence with the Kansas Disciplinary Administrator, to which Marquez objected on the grounds that

the documents were confidential under Supreme Court Rule 222 (2003 Kan. Ct. R. Annot. 305). Marquez apparently submitted the correspondence for an in camera inspection by the district court, after which the district court concluded that "there is nothing in that correspondence that could lead to relevant, admissible evidence in this case." The district court handled the matter appropriately, and we find no error.

On March 12, 2001, approximately 1 month after Sellens had completed his response to defendants' motions for summary judgment, Sellens filed a motion seeking to amend his petition. Sellens claimed the proposed amendments would: (1) identify evidence and facts which Sellens learned subsequent to his original petition and (2) amend Sellens' claims to remove any possible "fatal flaws." However, a copy of the proposed amended petition was not attached to the motion. In denying the motion, the district court said, "Without knowing what the proposed amended supplemental Petition contains, the court cannot, in good conscience, allow the filing of an amended or supplemental Petition based on the generalized statements of the Plaintiff in the Motion." A district court has broad discretionary power with respect to the amendment of pleadings. *Anderson v. Heartland Oil & Gas, Inc.*, 249 Kan. 458, 470, 819 P.2d 1192 (1991), *cert. denied*, 504 U.S. 912 (1992). Here, the court did not abuse that discretion.

Sellens' deposition was taken on August 22, 2000, and at the conclusion of the questioning, Sellens indicated on the record that he was not waiving the opportunity to read, correct, and/or sign the deposition. Sellens did not receive a copy of his deposition for a number of months. Based thereon, he attempted to suppress the deposition. At a hearing, one of the defense attorneys

indicated that Sellens and the court reporter, who transscribed Sellens' deposition, had became involved in a payment dispute and, as a result, the court reporter had refused to send the transcript unless Sellens paid in advance. The defense attorney presented the court reporter's affidavit, which evidently disclosed that the reporter had sent Sellens a copy of the transcript within the preceding couple of weeks. After listening to the parties' arguments, the district court denied Sellens' motion to suppress and ordered Sellens to read and/or sign the deposition by December 22, 2000. We find no prejudice to Sellens or reversible error in the suppression denial.

On appeal, Sellens raises issues regarding the timeliness of James P. Bambick's answer that were not presented to the district court. We decline to address them, even though we perceive they would not mandate reversal. See *Mynatt v. Collis*, 274 Kan. 850, 860, 57 P.3d 513 (2002) ("Generally, a party is not allowed to raise an issue on appeal not presented previously to the district court or inconsistent with the position taken before the district court.").

Sellens' argument that the granting of summary judgment violated his constitutional right to a jury trial requires no discussion for anyone with a modicum of legal knowledge. His complaint that the district court failed to comply with supreme Court Rule 165 (2003 Kan. Ct. R. Annot. 202) by making findings of fact and conclusions of law "in numerous instances" is too conclusory and vague to permit appellate review. His complaint that he was denied due process because of the bias of Judge Richardson lacks specificity, as well as any support in the record. The implication is that Sellens' ineptitude resulted in a succession of adverse decisions, for which

he now wants to transfer the blame to the presiding judge.

Sellens filed several motions in late April 2003 seeking reconsideration of judgments which had been filed prior to February 2003. The district court treated them as motions to alter or amend a judgment, pursuant to K.S.A. 60-259(f), and found that they were untimely. "Motions to reconsider are generally treated as motions to alter or amend under K.S.A. 60-259(f)." *Exploration Place, Inc. v. Midwest Drywall Co.*, 277 Kan. 898, 900, 89 P.3d 536 (2004). K.S.A. 60-259(f) requires that such motions shall be filed no later than 10 days after entry of the judgment. The district court was absolutely correct in denying or dismissing the motions.

Sellens objects to the court's finding that Sellens did not obtain proper service on the defendants. The finding was made at an April 2000 hearing on Sellens' motion for default judgment and has absolutely nothing to with an appeal of summary judgments entered after the district court had assumed personal jurisdiction over the defendants. An appeal is not the proper forum to refight every battle of the lawsuit. Affirmed.

APPENDIX C

[Filed Oct. 26, 2004]

IN THE SUPREME COURT
OF THE STATE OF KANSAS

District Court Case 00C4 KE

Supreme Court Order
Case No. 03-90976A

Charles J. Sellens
Uwabu Sakae-Machi 10-7
Komagane-Shi Nagano-Ken
399-4115 Japan

Pro Se

Case No. 03-90976-A

Charles J. Sellens, Appellant,

v.

American States Ins., Co., et al., Appellees.

You are hereby notified of the following action taken by the Court:

Motion to Publish Opinion by Appellant, Charles J. Sellens

Considered by the Court and denied.

Date: 10/26/2004.

Carol G. Green
Clerk